



Key aspects in the new LME

Legal Alert



July 2023

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Royal Decree-Law 5/2023 of 28 June 2023 (Official State Gazette of 29/06/2023), adopting and extending certain economic and social measures, and transposing EU Directives on structural modifications to commercial companies, a work-life balance for parents and carers, and the enforcement and observance of EU law (hereinafter “RD-Law 5/2023” or the “RD-Law”), ushered in a series of sweeping changes affecting, inter alia, the **legal regulations governing structural modifications**, both in Spain and for the cross-border intra- EU and extra-EU structural modifications.

The RD-Law brings with it far-reaching changes to a wide range of rules of a procedural, labour and, needless to say, commercial nature.

Among the latter, the most significant is the repeal, in the RD-Law’s Sole Repealing Provision, of Law 3/2009 of 3 April 2009, on structural modifications to commercial companies (the “**LME 2009**”), and the enactment, in Book One, of a new regulation divided into 4 Titles and 126 articles (the “**LME 2023**”), which modifies the legal regime applicable to conversions, mergers, divisions and en bloc transfers of assets and liabilities, in both domestic and cross-border intra- and extra-EU operations.

The urgency of these changes has called for the use of the regulatory instrument known as a Royal Decree-Law: the European Commission recently opened an infringement procedure against Spain after its failure to comply with the deadline for transposing Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019, as regards cross-border conversions, mergers and divisions (known as the “**Mobility Directive**”), which ended on 31 January 2023.

We set out below the key changes introduced by LME 2023, which will enter into force on 29 July 2023 (final provision 9 of the RD-Law).

Key aspects of domestic structural modifications

(i) Change in regulatory structure.

The LME 2023 is divided into four Titles, which, in turn, can be broken down into the following categories:

- I. Common part (Title I LME 2023), which sets out the provisions common to all structural modifications;

- II. Domestic structural modifications (Title II LME 2023), which sets out specific provisions regarding each type of structural modification; and
- III. Cross-border structural modifications, which sets out provisions included due to the specific characteristics of these types of structural modifications:
 - a. Intra-EU (Title III); and,
 - b. Extra-EU (Title IV).

(ii) Companies eligible for structural modification under the LME 2023

The LME 2023 extends eligibility to undergo or participate in a structural modification to companies subject to insolvency proceedings or, as the case may be, a restructuring or continuity plan. The rights of shareholders and creditors must reflect those set forth in Legislative Royal Decree 1/2020 of 5 May 2020, approving the Revised Insolvency Law.

(iii) Changes to directors’ reports on the draft terms of structural modification

The report shall be divided into two sections (or two separate reports shall be prepared) addressed to (a) shareholders and (b) employees, and must be drawn up by the managing body, subject to certain exceptions.

However, where the report is mandatory, this document must be made available to employees (or their representatives, as the case may be) together with the draft terms of structural modification one month prior to the date on which the structural modification is to be approved.

In such cases, employees (or their representatives, as the case may be) may express an opinion on the content of the report and any such opinions must be disclosed to the shareholders by the directors and attached to the report.

(iv) Requirement to obtain tax and social security clearance certificates

Eligibility to implement a structural modification will be subject to inclusion in the draft terms of evidence that all tax and social security obligations have been duly fulfilled. To this end, valid clearance certificates issued by the competent body must be furnished.

(v) Independent expert report and guarantees

At the request of the directors, the independent expert's report may contain an assessment of the adequacy of the guarantees offered to creditors under the draft terms of structural modification, as the case may be.

(vi) Disposal right of shareholders

Shareholders who vote against the draft terms or who hold non-voting shares or equity interests are now entitled to dispose of their shares, and registration of the structural modification on the mercantile register will neither interrupt nor prevent the exercise of this right.

(vii) Protection of creditors and right to submit observations

Creditors whose claims have arisen (and are not due) (a) prior to the publication of the relevant draft terms or, (b) where publication of the draft terms is not required, (i) after the date of publication of the notices of approval of the resolution by the shareholders' meeting (or the board of directors) or (ii) on the date of individual notification thereof to such creditors, may submit observations on the draft terms within one month of publication thereof (or of the resolution, as the case may be), and express their disagreement with the guarantees offered or the lack thereof, and apply to the mercantile registrar corresponding to the registered office or to the commercial court, depending on whether or not the guarantees were deemed inadequate by the independent expert, respectively.

Exercise of this right by creditors shall neither interrupt nor prevent registration of the structural modification on the mercantile register.

(viii) Definitive effects of registration

The structural modification may not be declared null and void once it has been registered.

(ix) Specific developments by type of structural modification

In addition to the above, the following are also particularly noteworthy:

(a) Conversion: requirement for draft terms of conversion.

The obligation to draw up draft terms of conversion now applies to conversions of domestic companies.

(b) Merger: elimination of one of the requirements for the independent expert's report in the case of forward merger leveraged buy-outs.

In the case of forward merger leveraged buy-outs, the independent expert's report need only state the reasons for the acquisition of control or assets, which justify, as the case may be, the merger operation. It must also contain an economic and financial plan detailing the affected resources and describing the objectives to be achieved.

The need for such a report to express an opinion on the existence or otherwise of financial assistance in the merger is eliminated.

(c) Division: distribution of assets and liabilities and liability of the divided company for the debts of the beneficiaries.

In this case, the LME 2023 introduces two major changes:

The first relates to the inclusion in the draft terms of division (in both total or partial divisions or spin-offs) of specific details of the distribution of the assets and liabilities - both those remaining at the divided company and those to be transferred to the beneficiary/ies.

The second relates to liability for debts, as liability for debts arising prior to the publication of the draft terms of division and not due at that time, which are assumed with the creditors of the company being divided or spun off by a receiving company and which are not paid, shall lie with all of the receiving companies on a joint and several basis, up to the amount of the net assets attributed to each of them in the division and, where it continues to exist, with the company being divided, up to the amount of the net assets retained by it. The receiving companies shall

also be jointly and severally liable for any debts of the divided company arising prior to the publication of the draft terms of division and not yet due at that time, such liability being subject to a time limit of five years.

(d) En bloc transfer of assets and liabilities: liability of the transferring company.

Where it is not wound-up, the transferring company shall be liable up to the amount of the net assets retained by it and, where it is wound up, such liability shall lie with the shareholders, subject to a maximum of the amount received by them in consideration for the transfer.

Keys aspects of cross-border structural modifications

In addition to the changes regarding domestic structural modifications, and in light of the Mobility Directive, the LME 2023 also introduces new provisions applicable to cross-border conversions (formerly referred to as "cross-border transfers of registered office") and cross-border mergers, while also setting out a new legal framework for cross-border divisions and en bloc transfers of assets and liabilities, both within and outside the EU.

In addition to the above, the following are also particularly noteworthy:

(i) Deadline for the pre-operation certificate

The mercantile registrar must issue the pre-structural modification certificate within three months. This period may be extended by a maximum of three more months where the registrar has suspicions of abuse or fraud.

Note that these are not strict deadlines, and the registrar may notify the affected company/ies, prior to the expiry of each of the above deadlines, of the reasons for any delay owing to the complexity of the transaction which make it impossible to meet them.

(ii) Employee notification, consultation and participation

Employees (or their representatives) must be informed and consulted before a decision is reached on either the draft terms of modification or the directors' report (whichever is issued first) and a reasoned response must be provided before the structural modification is approved.

(iii) Creditor entitlement to submit observations

Likewise, creditors will have 3 months as of publication of the draft terms of structural modification to submit observations and follow the above procedure for domestic structural modifications where they disagree with the guarantees, or no such guarantees are provided (detailed in point (vii) above).

(iv) Filing of complaints by creditors in cross-border conversions

For two years after the cross-border conversion has taken effect, creditors whose claims arose prior to the publication of the draft terms of conversion may continue to sue the company before the competent courts of the home state.

Conclusions

The LME 2023 has brought with it new regulations that reveal a desire to harmonise domestic and cross-border structural modifications, thereby affording a degree of consistency to the procedures to be observed in both cases.

The RD-Law introduces new requirements that change both the key aspects referred to above and others which, while of lesser importance, are nonetheless relevant, such as the inclusion of new information in the draft terms of structural modification or the possibility of the shareholders' meetings of the participating companies amending such draft terms.

Finally, it will be necessary to await the interpretation of the new provisions by the Directorate-General for Legal Certainty and Attestation, the courts and, in the final instance, the Supreme Court, in order to ascertain the ultimate scope of certain additions to the LME 2023, such as whether or not it is mandatory for the managing body to draw up a report on the draft terms for employees, even where the structural modification is unanimously approved by the shareholders.

Contacts:

Rafael Aguilar Mateo
Partner
KPMG Abogados
Tel. 91 456 34 13
raguilar@kpmg.es

Francisco J. Vázquez Oteo
Partner
KPMG Abogados
Tel. 91 456 34 13
franciscovazquezoteo@kpmg.es

KPMG offices in Spain

A Coruña

Calle de la Fama, 1
15001 A Coruña
Tel: 981 21 82 41
Fax: 981 20 02 03

Alicante

Edificio Oficentro
Avda. Maisonnave, 19
03003 Alicante
Tel: 965 92 07 22
Fax: 965 22 75 00

Barcelona

Torre Realia
Plaça de Europa, 41
08908 L'Hospitalet de Llobregat
Barcelona
Tel: 932 53 29 00
Fax: 932 80 49 16

Bilbao

Torre Iberdrola
Plaza Euskadi, 5
48009 Bilbao
Tel: 944 79 73 00
Fax: 944 15 29 67

Girona

Edifici Sèquia
Sèquia, 11
17001 Girona
Tel: 972 22 01 20
Fax: 972 22 22 45

Las Palmas de Gran Canaria

Edificio Saphir
C/Triana, 116 – 2º
35002 Las Palmas de Gran Canaria
Tel: 928 33 23 04
Fax: 928 31 91 92

Madrid

Torre Cristal
Paseo de la Castellana, 259 C
28046 Madrid
Tel: 91 456 34 00
Fax: 91 456 59 39

Malaga

Marqués de Larios, 3
29005 Málaga
Tel: 952 61 14 60
Fax: 952 30 53 42

Oviedo

Ventura Rodríguez, 2
33004 Oviedo
Tel: 985 27 69 28
Fax: 985 27 49 54

Palma de Mallorca

Edificio Reina Constanza
Calle de Porto Pi, 8
07015 Palma de Mallorca
Tel: 971 72 16 01
Fax: 971 72 58 09

Pamplona

Edificio Iruña Park
Arcadio M. Larraona, 1
31008 Pamplona
Tel: 948 17 14 08
Fax: 948 17 35 31

San Sebastián

Avenida de la Libertad, 17-19
20004 San Sebastián
Tel: 943 42 22 50
Fax: 943 42 42 62

Seville

Avda. de la Palmera, 28
41012 Sevilla
Tel: 954 93 46 46
Fax: 954 64 70 78

Valencia

Edificio Mapfre
Paseo de la Alameda, 35, planta 2
46023 Valencia
Tel: 963 53 40 92
Fax: 963 51 27 29

Vigo

Arenal, 18
36201 Vigo
Tel: 986 22 85 05
Fax: 986 43 85 65

Zaragoza

Centro Empresarial de Aragón
Avda. Gómez Laguna, 25
50009 Zaragoza
Tel: 976 45 81 33
Fax: 976 75 48 96

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